STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of Mary S. Irwin Revocable Trust.

JAMES LYLE, BRITTANY LYLE and BRANDON LYLE,

Petitioners-Appellants,

v

MARY S. IRWIN REVOCABLE TRUST, CARNEGIE MELLON UNIVERSITY, BARBARA ANN KARMONOS CANCER INSTITUTE, JOHNSON, ROSATI, LABARGE, ASELTYNE & FIELD, P.C., HERLONG CATHEDRAL SCHOOL, PYTELL & VARCHETTI, P.C., DANIEL MAITLAND IRWIN EMPHYSEMA RESEARCH FUND and COLONIAL WILLIAMSBURG FOUNDATION,

Respondents-Appellees.

UNPUBLISHED
March 18, 2003

No. 236946
Macomb County Probate Court
LC No. 00-165963-TI

Before: Cooper, P.J. and Murphy and Kelly, JJ.

PER CURIAM.

Petitioners appeal as of right an order granting respondent Carnegie Mellon University's (CMU) motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts

Before her death, Mary S. Irwin (decedent) prepared two separate revocable trust agreements. The first, dated October 29, 1991 (1991 trust), stated decedent's wish that her grandnephew and grandniece, Brandon Lyle and Brittany Lyle, be encouraged to pursue an education at CMU or some equally qualified college or university. The 1991 trust also provided financial means to pursue the education.

Decedent amended the 1991 trust on June 28, 1996 (1996 amended trust), to provide in relevant part:

> **3.4 Creation of Trust for Certain Persons**. When I die, Trustee shall set aside from the remainder of my Trust estate the sum of Three Hundred Thousand ($300,000) Dollars, to be held in Trust for the benefit of my grandnephew, BRANDON LYLE and my grandniece, BRITTANY LYLE, under the terms and conditions as set forth below:
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> * * *
>
> **3.4(b) Intent.** It is my intent that these two (2) Trusts are for educational purposes only, in order to assist the two beneficiaries in obtaining a University Degree. Trustee shall inform each beneficiary (preferably as they prepare to enter the first year of high school, which I refer to as the 9th grade,) that if they choose to attend CARNEGIE MELLON UNIVERSITY, full tuition will be paid and room and board, if needed, for the first four (4) years of school.
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> * * *
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> These funds must be used for attendance at CARNEGIE MELLON UNIVERSITY within five (5) years of graduation from high school.
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> * * *
>
> **3.4(c)** Upon graduating from CARNEGIE MELLON UNIVERSITY or if the beneficiary does not attend CARNEGIE MELLON UNIVERSITY . . . the remaining trust principal and accumulate income shall be paid to the remainder beneficiaries . . . .

Brandon twice applied for admission at CMU, but was rejected. He attended another university, but the financial obligations were not covered by the trust. James Lyle, decedent's nephew and Brandon and Brittany's father, moved the probate court to register both the 1991 and the 1996 amended trusts and set aside the 1996 amended trust as null and void based on undue influence and lack of mental capacity.[1] In the alternative, James alleged the 1996 amended trust was ambiguous, and requested that the probate court determine decedent's intent regarding Brandon and Brittany's education.

CMU moved for summary disposition on all claims. After a hearing, the probate court concluded that the language "if they choose to attend [CMU]" in section 3.4 of the 1996 amended trust, was not ambiguous. The probate court also found that the word "choose" was clear and intelligible suggesting but one meaning. The probate court explained that before someone can choose to attend a particular school, he must first be accepted by that school. Because there was no ambiguity, the probate court concluded that it was only permitted to look within the four corners of the trust to derive decedent's intent. The probate court found the language of section 3.4 of the 1996 amended trust clearly meant that decedent only intended to provide for Brandon and Brittany's education if they attended CMU. Furthermore, the probate

[1] James withdrew these allegations and acquiesced to the validity of the amended 1996 trust.

court found the term "must" in section 3.4(b) was mandatory, not permissive, and granted the motion for summary disposition.

II. Standard of Review and Applicable Law

A trial court's decision to grant summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A probate court's construction or interpretation of trust instruments is reviewed for clear error. *Miller v Dep't of Mental Health,* 432 Mich 426, 434; 442 NW2d 617 (1989); *In re Estate of Green,* 172 Mich App 298, 311; 431 NW2d 492 (1988). "A finding is clear error when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *In re Estes Estate,* 207 Mich App 194, 208; 523 NW2d 863 (1994).

If the language of a trust is not ambiguous, the testator's intent must be gleaned from the four corners of the document. *In re Maloney Trust,* 423 Mich 632, 639; 377 NW2d 791 (1985), quoting *In re Kremlick Estate,* 417 Mich 237, 240; 331 NW2d 228 (1983). However, if a trust evidences a patent or latent ambiguity, a court may establish the testator's intent by considering two outside sources, (1) surrounding circumstances and (2) rules of construction. *Id.* A latent ambiguity exists where the language and its meaning are clear, but some extrinsic fact creates the possibility of more than one meaning. *In re Woodworth Trust,* 196 Mich App 326, 327; 492 NW2d 818 (1992). A latent ambiguity may be proved by facts extrinsic to the testamentary instrument. *In re McPeak Estate,* 210 Mich App 410, 412; 534 NW2d 140 (1995).

III. Analysis

Petitioners first argue that the phase "if they choose to attend" in section 3.4(b) of the 1996 amended trust is ambiguous creating a question of fact regarding decedent's intent. We disagree.

In creating the 1996 amended trust, decedent specifically modified the language of the 1991 trust that provided Brandon and Brittany's education would be funded by the trust if they attended CMU *or* some other equally qualified college or university. However, in the 1996 amended trust, decedent specifically provided that the funds "must be used for attendance at [CMU] . . . ." The use of mandatory, rather than permissive, language with the specific naming of CMU clearly indicates that decedent intended the monies to be used for an education at CMU only.

Moreover, we agree with the probate court's observation that it is axiomatic that a person cannot choose to attend a particular university without having first been accepted by that university. Thus, acceptance by CMU is a condition precedent to Brandon or Brittany choosing to attend the school. The challenged language of the 1996 amended trust is not ambiguous on its face, is clear and intelligible, and suggests but one meaning. The probate court correctly limited its interpretation of the language of the trust to the four corners of the document and did not err in granting CMU's motion for summary disposition.

We also reject petitioners' argument that the trust contains a latent ambiguity. Specifically, petitioners argues that that Susan Lahay, decedent's friend and business associate, and Robert Pytell, the scrivener of the 1996 trust, both stated that they never had a conversation

with decedent about the possibility of Brandon or Brittany being denied admission to CMU. First, scrivener's testimony about a drafting mistake or the testator's intent cannot be considered in interpreting the trust document where no ambiguity exists on the face of the document. See *Burke v Central Trust Co*, 258 Mich 588, 592; 242 NW 760 (1932). Second, even assuming decedent failed to consider this possibility in drafting the 1996 trust, this Court will not create or interpret language in order to compensate for decedent's oversight. *Estate of Norwood*, 178 Mich App 345, 349; 443 NW2d 798 (1989). We find the circumstances in this case do not create the possibility of more than one meaning for the disputed language.

Petitioners also argue the probate court erred in failing to consider the expert opinion of Douglas J. Rasmussen.[2] Rasmussen, an attorney with over thirty years' experience in trust and probate matters, opined that it was decedent's overarching intent to provide funds for Brandon and Brittany to receive a university degree. However, because no ambiguities exist, latent or otherwise, we find the probate court properly disregarded this extrinsic evidence and the expert's suggestion that the doctrine of deviation be applied.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

[2] We note that the probate court's order granting summary disposition indicates that the court did in fact "consider" the expert affidavit.